UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

UNITED STATES OF AMERICA, Complainant,	)	8 U.S.C. 1324a Proceeding
v.	)	CASE NO. 91100012
ENRIQUE MARTINEZ and HERLINDA MARTINEZ, Individually and d.b.a. ENRIQUE'S RESTAURANT, Respondents.	)	

DECISION AND ORDER GRANTING COMPLAINANT'S MOTION FOR PARTIAL SUMMARY DECISION AND ASSESSING CIVIL PENALTIES

E. MILTON FROSBURG, Administrative Law Judge

Procedural History:

On January 28, 1991, the United States of Complainant, filed a Complaint agai Herlinda Martinez, Individually Restaurant, Respondents. The Notice of Intent to Fine which July 17, 1990, contained six co Section 274A of the Immigration 8 U.S.C. § 1324a. Complainant $29,325.00 for these violations.

On January 30, 1991, I Hearing on Complaint from Administrative Hearing Office Administrative Law Judge, advisi to file an Answer within 30 days and setting the hearing location Texas.

Respondents filed an specifically admitting or denyin setting forth what appeared to April 4, 1991, I conducted a pre-

with the parties and learned that settlement of this case had been discussed, but that the parties were unable to agree upon a settlement figure. The parties indicated that they were involved in discovery at that time.

A second telephonic conference was held on June 20, 1991. Complainant indicated that a Motion for Partial Summary Decision had been prepared and mailed. Respondent indicated that it would probably not oppose the granting of summary decision on liability issues only, but that it wished an opportunity to provide information relative to the assessment of an appropriate civil penalty. I instructed Respondent to file a response to the Motion for Partial Summary Decision by July 3, 1991. Both parties agreed to submit written briefs outlining their positions as to the assessment of a civil penalty by July 19, 1991.

I received a Memorandum in Support of Complainant's Motion for Partial Summary Decision on June 25, 1991, along with the Motion. On July 15, 1991, Complainant requested additional time in which to file its brief regarding civil penalties. In my Order of July 18, 1991, I granted Complainant's request for additional time, requesting that the briefs be filed by August 5, 1991, I also indicated that I would grant Complainant's Motion for Partial Summary Decision as unopposed if I did not receive a response from Respondents by July 26, 1991.

On July 29, 1991, I received Respondents' Memorandum Regarding the Imposition of Fine. On July 31, 1991, I received Complainant's Memorandum in Support of Civil Money Penalties.

Findings of Fact and Conclusions of Law:

I have reviewed Complainant's Motion for Partial Summary Decision and the Memorandum in support thereof. Complainant contends that no genuine issues of material fact exist with respect to liability and that it is entitled to summary decision as a matter of law.

The federal regulations applicable to this proceeding authorize an ALJ to "enter summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise...show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 28 C.F.R. Part 68.36; see also Fed. R. Civ. Proc. 56(c).

The purpose of the summary judgment procedure is to avoid an unnecessary trial when there is no genuine issue as to any material fact, as shown by the pleadings, affidavits,

discovery, and judicially-noticed matters. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). A material fact is one which controls the outcome of the litigation. See Anderson v. Liberty Lobby, 477 U.S. 242 (1986); see also Consolidated Oil & Gas, Inc. v. FERC, 806 F.2d 275, 279 (D.C. Cir. 1986) (an agency may dispose of a controversy on the pleadings without an evidentiary hearing when the opposing presentations reveal that no dispute of facts is involved).

Rule 56(c) of the Federal Rules of Civil Procedure permits, as the basis for summary decision adjudications, consideration of any "admissions on file." A summary decision may be based on a matter deemed admitted. See, e.g., Home Indem. Co. v. Famularo, 539 F. Supp. 797 (D. Colo. 1982). See also Morrison v. Walker, 404 F.2d 1046, 1048-49 (9th Cir. 1968) ("If facts stated in the affidavit of the moving party for summary judgment are not contradicted by facts in the affidavit of the party opposing the motion, they are admitted."); and U.S. v. One Heckler-Koch Rifle, 629 F.2d 1250 (7th Cir. 1980) (Admissions in the brief of a party opposing a motion for summary judgment are functionally equivalent to admissions on file and, as such, may be used in determining presence of a genuine issue of material fact).

I agree with Complainant that no genuine issues of material fact remain in dispute regarding the liability issues in these allegations. Respondents admitted to liability for the violations alleged in Count I in their Answer. Respondents admitted in their responses to requests for admissions that they employed each of the individuals identified in Counts II through VI and that the Forms I-9 attached thereto were true and correct copies of the Forms I-9 presented to the INS on the date of the inspection. Respondents have never responded to the Motion for Partial Summary Decision. Therefore, I find that no genuine issues of fact remain with respect to liability issues in Counts II through VI.

I further find that Complainant is entitled to summary decision as to each of the violations alleged in Counts I through VI. Complainant has demonstrated by a preponderance of the evidence that: (1) Respondents are persons or an entity within the definition of 8 U.S.C. § 1324a(a)(1)(B); (2) Respondents hired for employment in the United States each of the persons identified in the Complaint after November 6, 1986; and (3) Respondents failed to comply with the verification requirements of 8 U.S.C. § 1324a(b) with respect to each of the individuals identified in Counts I through VI of the Complaint.

Having found these violations, I must assess a civil money penalty pursuant to Sections 274A(e)(4) and 274A(e)(5) of the Act, which require the person or entity to pay a civil penalty. The statute states, in pertinent part, that:

> With respect to a violation of subsection (a)(1)(A) or (a)(2), the order under this subsection -
> (A) shall require the person or entity to cease and desist from such violations and to pay a civil penalty in an amount of -
> (i) not less than $250 and not more than $2,000 for each unauthorized alien with respect to whom a violation of either subsection occurred,...
>
> With respect to a violation of subsection (a)(1)(B), the order under this subsection shall require the person or entity to pay a civil penalty in an amount of not less than $100 and not more than $1,000 for each individual with respect to whom such violation occurred. In determining the amount of the penalty, due consideration shall be given to the size of the business of the employer being charged, the good faith of the employer, the seriousness of the violation, whether or not the individual was an unauthorized alien, and the history of previous violations.

8 U.S.C. §§ 1324a(e)(4) and 1324a(e)(5).

In this case, Complainant assessed a civil penalty of $24,225.00 for the 57 violations in Count I (assessed at $425.00 per violation); $1,360.00 for the four violations in Count II (assessed at $340.00 per violation); and $2,040.00 for the six violations in Count III (assessed at $340.00 per violation); $1,020.00 for the three violations in Count IV (assessed at $340.00 per violation); and $340.00 for each of the singular violations in Counts V and VI, for a total penalty of $29,325.00.

Respondents submit in mitigation of the fine that they never received any information relative to the employment eligibility verification requirements from the INS and that their first contact with the INS was during the inspection of their records. Even then, Respondents received no helpful information from the INS agent to assist them in complying with the law. Respondents contend that they have been cooperative throughout this proceeding and have attempted to fully comply with the IRCA's requirements.

It is not the intent of the IRCA to put people out of business as a result of the payment of fines, but to seek compliance with its regulations, including the paperwork requirements. Keeping this in mind, I have considered the parties' positions and the five factors listed above and will address my findings as to each of them.

Size of Business: I find that Respondent is a small business with approximately 15 to 20 employees on its payroll at any one time. It is an unincorporated business, operated by a husband and wife. Respondents submit that their net income for the year 1990 was approximately $15,000.00. Based on the small size of Respondents' business, I agree with the Respondents that they are entitled to mitigation of the penalty.

Good Faith: Complainant has demonstrated that the Respondents had, on numerous occasions prior to the inspection of their records, been provided with copies of the M-274 Handbook for Employers. The Respondent owners or their manager had met with employees from the Department of Labor in 1988 and had received copies of this publication which outlines the employers' obligations under IRCA. Complainant contends that no mitigation of the penalty is appropriate under this factor because of the large number of violations and high percentage of non-compliance demonstrated by this business.

Respondents argue that they never received assistance from the INS in learning of their obligations under IRCA and that they have fully cooperated with the INS throughout this proceeding.

I agree with Complainant that Respondents have not demonstrated sufficient good faith to mitigate the penalty. This factor will not be mitigated in Respondents' favor.

Seriousness of the Violation: Paperwork violations are considered serious in the IRCA framework, with the failure to present I-9's being more serious than the failure to adequately complete the forms. The employer's failure to prepare I-9's completely, demonstrating a failure to verify employment eligibility in the United States, could lead to the hiring unauthorized aliens, thus defeating the purpose

I find that the penalty somewhat with respect to Count Respondents are not entitled to a the Count I violations.

Evidence of Illegal Aliens: Both parties agree that Respondents are entitled to full mitigation of the penalty for this criteria, as no illegal aliens were found to be employed by Respondents.

History of Previous Violations: Both parties agree that Respondent's history is free from previous IRCA violations, therefore this factor will also mitigate the

penalty in Respondent's behalf.

Based upon my findings regarding these five criteria, I will adjust the penalty sought by Complainant downward. I find that it is reasonable to require Respondents to pay $200.00 for each of the 57 violations in Count I, for a total penalty of $11,400.00 for that Count. For each of the remaining violations, I find that it is reasonable to require Respondents to pay a civil penalty of $150.00 per violation. Therefore, the penalty for Count II is $600.00, for Count III is $900.00, for Count IV is $450.00, for Count V is $150.00 and for Count V is $150.00. The total civil penalty is $13,650.00.

Ultimate Findings of Fact, Conclusions of Law, and Order:

In addition to the findings and conclusions previously mentioned, I make the following ultimate findings of fact and conclusions of law:

1. As previously found and discussed, I have determined that Respondents Enrique and Herlinda Martinez, d.b.a. Enrique's Restaurant, have violated Section 274A(a)(1)(B) of the Act as alleged in the Complaint.

2. That, as previously discussed, it is just and reasonable to require Respondent to pay a civil money penalty in the amount of thirteen thousand six hundred fifty dollars ($13,650.00) for Counts I through VI of the Complaint.

3. That the hearing to be scheduled in or around Corpus Christi, Texas is cancelled.

4. That as provided by 28 C.F.R. Part 68.51, this Order shall become the final Decision and Order of the Attorney General unless within 30 days from the date of this Order, the Chief Administrative Hearing Officer shall have modified or vacated it.

IT IS SO ORDERED this 1st day of August, 1991, at San Diego, California.

E. Milton Frosburg

E. MILTON FROSBURG
Administrative Law Judge

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